

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000387-001 DT

01/07/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED:\_\_\_\_\_

BARBARA J GUMINSKI

LARRY J COHEN

v.

ARIZONA VETERINARY MEDICAL  
EXAMINING BOARD (001)

MARC H HARRIS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.<sup>1</sup> The reviewing court may not substitute its own discretion for that exercised by the agency,<sup>2</sup> nor may it act as the trier of fact,<sup>3</sup> but must only determine if there is any competent evidence to sustain the decision.<sup>4</sup> This court may not function as "super

<sup>1</sup> *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

*Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

<sup>2</sup> *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

<sup>3</sup> *Siler v. Arizona Dept. of Real Estate*, 193 Ariz. 374, 972 P.2d 1010 (App. 1998).

<sup>4</sup> *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

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agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.<sup>5</sup>

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, Barbara Guminski seeks review of the Arizona Veterinary Medical Examining Board's (hereinafter "the Board") administrative order. After a careful review of the record, I find sufficient competent evidence to reverse the decision of the Board.

**Facts**

On June 18, 2002, Plaintiff, Barbara Guminski, a veterinarian with the Spay and Neuter Clinic, performed a ovariectomy on a Great Dane. During the procedure, large amounts of blood poured from the uterine vessels in the ovarian stump region into the abdomen. Plaintiff called for her technician to scrub-in and assist Plaintiff in controlling the bleed. The bleeding was so irrepressible that Plaintiff could not see where she was placing the ligatures (surgical tie-offs). Plaintiff was required to use her fingers to feel for objects that would need to be moved out of the way so that she could ligate the perforated vessels in the abdomen. After Plaintiff placed secondary and tertiary ligations as safeguards, she noticed that the bleeding had ceased. After suturing the dog's incisions, Plaintiff monitored the dog post-surgically until the owners arrived. Plaintiff advised the owners that they should take the dog to an emergency clinic where it could be properly monitored throughout the night. The owners opted to take the dog home due to financial constraints. The following morning, the owners took the dog to an emergency clinic, where they were referred to a Dr. Jackman at the Aqua Fria Animal Clinic. Dr. Jackman performed a series of tests and noted that the dog was not urinating.

On June 20, 2002, Plaintiff received a phone call from Dr. Morrison, a veterinarian at the Spay and Neuter Clinic, informing Plaintiff that the dog's owners had brought the dog back to the clinic, as recommended by Dr. Jackman. Dr. Morrison expressed concerns that Plaintiff inadvertently ligated a ureter during the procedure, for the dog was sick and had not urinated since the procedure. Plaintiff said that this was a possibility, and was unaware that the dog had not urinated since the procedure due to the fact that the dog was never again in Plaintiff's care. The owners returned the dog to Dr. Jackman where he performed exploratory surgery and found that the dog's kidneys were enlarged and that there was no urine in the bladder. Dr. Jackman then recommended euthanasia to avoid further suffering by the dog; the dog was euthanized. Plaintiff was told of the dog's euthanasia the following day, when Plaintiff called the Spay and Neuter Clinic to inquire about the dog's recovery.

In July 2002, the dog's owners filed a complaint with the Board alleging negligence by both Plaintiff and Dr. Morrison. On September 3, 2002, the Board reviewed the case by way of

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<sup>5</sup> *DeGroot v. Arizona Racing Com'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).

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an investigative committee. The committee proposed thirty-four (34) factual findings and four (4) violations of the Veterinary Practice Act. The Board resolved the matter through informal interview hearings that were held on November 20, 2002, December 18, 2002, and January 15, 2003. On January 31, 2003, the Board made findings of fact and conclusions of law based on the hearings. The Board found that Plaintiff violated A.R.S §32-2232(11)<sup>6</sup> and(18)<sup>7</sup>, and voted to place Plaintiff on probation for four (4) years, and required Plaintiff to obtain twenty-eight (28) hours of continuing education in specific areas of veterinary science. On April 25, 2003, Plaintiff timely filed an administrative review complaint with this court, and now seeks review of the Board's decision.

**Issue & Analysis**

The first issue raised by Plaintiff is whether the Board applied an inapplicable standard of care and review. In the Board's Findings of Fact, Conclusion of Law, and Order, the Board finds:

Tying off the ureters during a routine spay is below the  
standard of care since tying off ureters is not part of a spay.<sup>8</sup>

As Plaintiff argues, is clear that the Board only considered what a reasonable and prudent veterinarian would do in a "routine spay" procedure. The Board undoubtedly did not apply a standard of care encompassing the extraordinary emergency situation encountered by Plaintiff. An abdomen flooded by an incessant bleed, to the extent that a veterinarian surgeon has to use her hands to feel for ligatures, is far from a "routine spay."

Defendant argues that this is an issue concerning the sufficiency of the evidence. Defendant correctly argues that this court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.<sup>9</sup> In Arizona it is well settled that all evidence must be viewed in a light most favorable to sustaining a judgment, and that all reasonable inferences will be resolved against the appellant.<sup>10</sup> If conflicts in evidence exist, the

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<sup>6</sup>"Malpractice, gross incompetence or gross negligence in the practice of veterinary medicine."

<sup>7</sup> "Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation or conspiracy to violate any of the provisions of this chapter, a rule adopted by the board or a written order of the board."

<sup>8</sup> p. 3, ll. 20-21.

<sup>9</sup> *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

<sup>10</sup> *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

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reviewing court must resolve such conflicts in favor of sustaining the conclusions of the fact finder.<sup>11</sup>

However, this is not an issue of sufficiency of the evidence, but of legal error by the Board in its application of a standard of care not relevant to the emergency situation faced by the Plaintiff in this case. The Board applied a standard of care that wholly disregarded Plaintiff's circumstances. Under the blood-blinding conditions in which Plaintiff was operating, it is foreseeable that a veterinarian surgeon may miss a ligature. Nothing in the record shows that Plaintiff acted negligently under the unusual emergency circumstances present in this case.

The second issue is whether the Board wrongly concluded that Plaintiff engaged in unprofessional conduct in connection with the dog's post-surgical care. This issue does concern the sufficiency of evidence heard by the Board.

After a thorough review of the record, I find no evidence that Plaintiff engaged in unprofessional conduct in connection with the dog's post-surgical care. The record shows that the dog's owners did not take the dog to be monitored overnight, as recommended by Plaintiff. Also, the owners took the dog to another clinic the following day. Once the owners eventually brought the dog back to the Spay and Neuter Clinic, they did not seek care from Plaintiff, but rather another veterinarian, Dr. Morrison. The record shows that Plaintiff made numerous phone calls to the clinic, and had her technician phone the owners at home, to inquire about the dog's well being. After the emergency procedure, Plaintiff never had the opportunity to see the dog for a post-surgical examination. Clearly, the Plaintiff was excluded from the dog's post-surgical care by the actions of the owners.

Consequently, this court reverses the administrative agency's decision, for an improper standard of care was applied, and the Board's decision concerning Plaintiff's post-surgical care of the dog was clearly unsupported by substantial evidence.

IT IS ORDERED reversing the decision of the Arizona Veterinary Medical Examining Board in this case.

IT IS FURTHER ORDERED granting the relief as requested by the Plaintiff in her complaint.

IT IS FURTHER ORDERED that counsel for the Plaintiff shall prepare and lodge a judgment consistent with this minute entry opinion no later than February 10, 2005.

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<sup>11</sup> *Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).